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FILED
SEP 16 1955
HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, [redacted] 1955

No. [redacted] 68

GREAT LAKES STEEL CORPORATION,
a Delaware Corporation,
Petitioner,
vs.
UNITED STATES OF AMERICA,
INTERSTATE COMMERCE COMMISSION,
THE BALTIMORE AND OHIO RAILROAD COMPANY,
ERIE RAILROAD COMPANY, and the
PENNSYLVANIA RAILROAD COMPANY,
Respondents

REPLY BRIEF OF PETITIONER

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a lower court has reached the wrong result in deciding a case or to review the sufficiency of the evidence presented to an administrative body. On p. 11 of our petition for certiorari we stated that the effect of the decision of the Commission in this case is to prevent the application of transit tariffs to all shipments made on government bills of lading regardless of the provisions of the transit tariffs. This is certainly a question of general interest arising under the Interstate Commerce Act and one of sufficient importance, particularly to government contractors and to the railroads, to warrant consideration by this Court. Hence the decision in this case involves much more than the bare right of Petitioner to recover from the Railroads the amount of the claimed overcharges or the review of findings of fact made by the Commission.

Before considering the effect of the Commission's decision it might be well to note the disagreement between the Respondents as to what the Commission actually decided in this case. On p. 11 of the Commission's brief it is stated that the Commission arrived at its decision in this case by an interpretation of the various tariff provisions, which, the brief implies, were in some respects ambiguous or uncertain. The brief of Respondent Railroads (p. 37) denies any such interpretation on the part of the Commission saying, "It was not necessary for the Commission to make any finding concerning the terms of the transit tariffs, since it found that the shipments were separate and distinct".

If the Commission's decision in this case is based on its interpretation of the particular provisions of the transit tariffs, such fact was very well concealed in the Commission's opinion (Appendix 1 to Petition for Writ of Certiorari). The opinion of the Commission is completely barren of any reference to any provision of the transit tariffs asserted to be ambiguous or uncertain. It completely fails either to point out or to mention any provision which should

have been inserted in the tariffs which would resolve any claimed ambiguity or uncertainty. Except for reference to the fact that the tariffs provided two methods by which the benefit of the transit tariffs could be obtained and limited a shipper to the use of only one of these methods, the opinion of the Commission contains no discussion whatever of the tariffs involved or any of their provisions, or makes any finding that there was any failure to comply with any provision of these particular tariffs. On the contrary, the opinion of the Commission shows quite plainly that it determined that the facts existing in this case showed such a break in the continuity of the shipments as to preclude the application of transit tariffs or the use of the theory of transit, regardless of the provisions of the transit tariffs. If, on the other hand, as the Commission now asserts, the Commission arrived at its decision by a construction of the terms of the tariffs, it completely disregarded all proper rules of construction which it should have followed in interpreting the tariffs. These rules and the decisions announcing them, including decisions of the Commission itself, are set forth on pp. 12 and 13 of the petition for writ of certiorari.

The tariffs, by their very terms, were to be applied to all shipments complying with the conditions set forth in the tariffs. Rule 1 of the tariff of the Erie Railroad Company (I. C. C. Ex. 63, Rule 1, p. 404b) provided that subject to the rules, regulations, conditions and charges therein set forth, carload shipments of the articles listed in the tariff when originating in the prescribed territory, might be forwarded to Mansfield, Ohio, for the purpose of fabricating, and reshipped therefrom to the prescribed destinations.

Rule 2 of that tariff stated that the privilege of fabricating "will be granted only to operators of fabricating plants who keep records, file reports and handle shipments in the manner prescribed herein, and permit inspection of records * * *" (p. 405b).

Rule 5 of the tariff of the Baltimore & Ohio Railroad Company provides that to be entitled to the transit privileges accorded under that tariff, transit operators will be required to make written application in the form and manner provided in the rule. (I. C. C. Ex. 65, p. 413b.)

Rule 10 of that tariff states that transit privileges will only be accorded "shippers, transit house owners or operators who comply with these rules, keep records in the manner prescribed in Rules 15 and 25, and make statements, when requested, as to tonnage and representative freight bills on hand, and make affidavit, when required, as to the accuracy of such records and statements, and permit inspection thereof, * * *." (I. C. C. Ex. No. 65, p. 413b.)

Rules 5 and 10 of the tariff of the Pennsylvania Railroad Company are in all material respects identical with Rules 5 and 10 of the Baltimore & Ohio Railroad Company tariff. (I. C. C. Ex. 68, p. 437b.)

While the tariffs are lengthy and contain many conditions, qualifications and limitations, there was no qualification, condition or limitation which made any reference to or which in any way depended on any of the facts found by the Commission in its decision, and the Commission's decision did not purport to find the tariff privileges inapplicable because of any such qualification, condition or limitation. While the opinion of the Commission did not say so in explicit language, the decision of the Commission denying the applicability of the transit tariffs was based solely on the fact that the shipments here under consideration moved on government bills of lading, and in so holding the Commission completely disregarded Condition #2 on the back of each government bill of lading which reads as follows:

> "2. Unless otherwise specifically provided or otherwise stated hereon, this bill of lading is subject

> to the same rules and conditions as govern commercial shipments made on the usual forms provided therefor by the carrier." (I. C. C. Exhibits 77 and 78, pp. 477b and 478b.)

We shall amplify this later in this brief. We mention it at this point only to show that if the Commission arrived at its decision as a result of interpretation of either the transit tariffs themselves or of the bills of lading, the decision of the Commission was clearly wrong and should have been set aside by the lower courts.

We think the statement in the Railroads' brief, that the Commission did not make any finding concerning the terms of the transit tariffs since it found that the shipments were separate and distinct, is correct. We assert, however, that its finding that the shipments were separate and distinct, is not only completely without support in the record but is based on findings which, if supporting that conclusion, prohibit the application of transit tariffs to any shipment where the movement from the transit point is made on a government bill of lading. The entire substance of the Commission's decision is included in two sentences reading as follows:

> "It was the purpose of the Navy Department to make new shipments from Mansfield, independent of the inbound movements."
>
> * * * * *
>
> "The continuity of the shipments under consideration was terminated at the transit point when the Navy Department, which became the owner of the goods when they were loaded on cars at Mansfield, elected to ship them from that point as separate and independent shipments."

We submit that there was no competent evidence on the whole record from which the Commission could conclude that the Navy Department had any purpose or intent which could destroy the right of Petitioner under the transit tariffs or, to state it otherwise, which could establish any break in the continuity of the shipments, unless the bare fact of the use of a government bill of lading, in and of itself, establishes such a break.

The nearest approach to any such evidence is the following testimony of Lieutenant Dippold of the Navy Department:

> "Q. (By Mr. Cole): Was it or was it not the desire and aim of the Bureau of Yards and Docks in preparing such government bills of lading, showing Mansfield as the shipping point, to make separate, distinct and new shipments from that point independent of any transportation matters that may be connected with the inbound movement or movement of materials into Mansfield prior to it being worked up into the condition in which it was being shipped out on the bill of lading?
>
> "A. To the best of my recollection, yes.
>
> "Q. (By Mr. Kaier): That is 'yes', new shipments were intended?
>
> "A. (Witness indicates 'yes'.)
>
> "Mr. Cole: He is shaking his head 'Yes'.
>
> "The Witness: New shipments were intended." (p. 279a.)

But this is not sufficient substantial evidence to support the finding of the Commission for two reasons: First Lieutenant Dippold's statement of a *general* intent in the part of the Navy Department is directly contradicted by his testimony as to *specific facts.* Second, because the "desire and aim" of the government to make "separate, distinct and new shipments" is in no way determinative of

whether the shipments are in fact continuous shipments from point of origin through the transit point to point of ultimate destination.

Much has been said in the briefs of Respondents about the "intent" of the government that the shipments from the transit point be considered as independent of the inbound movements, but the very authorities which the Respondents cite in support of their position demonstrate not only that that intent is not sufficient to break the continuity of a shipment but that the government at all times had the intention which both the Commission and the Courts have said makes a shipment continuous. *Memphis Merchants Exchange v. Illinois Central Railroad Company*, 43 I. C. C. 378, pointed out the precise kind of intent that makes a transit shipment a continuous one. In that case the Commission said (p. 388):

> "The true and controlling intent which determines the essential character of the commerce is not fully matured and fixed until the party who, having the right so to do, decides, under the options lawfully available to him under the transit tariffs, what is to be the final destination of the shipment."

That same principle was applied by this Court in *Baltimore & Ohio Southwestern Railroad Company v. Settle*, 260 U. S. 166. In that case Settle shipped certain lumber from points in the South to Oakley, Ohio, and then reshipped the lumber from Oakley to Madisonville, Ohio. Since the interstate rate from the South to Oakley plus the intrastate rate from Oakley to Madisonville was less than the interstate rate from the South to Madisonville, Settle attempted, by treating this as two shipments instead of one, to obtain a lower transportation charge for the shipment. In holding that the two shipments must, as a matter of law, be considered as a continuous one, this Court pointed out that Settle's desire to have these considered as separate shipments was of no consequence; that it was

neither probable nor expected that the material would be disposed of at Oakley and that it was always Settie's intention that the material be stopped at Oakley only temporarily and would then be reshipped to Madisonville, and that it was this intention that required a determination that the shipments be regarded as continuous rather than as separate.

In *Baltimore & Ohio Railroad Company v. United States*, 24 F. Supp. 734, the Railroad brought suit to set aside an order of the Interstate Commerce Commission which, in effect, required the Railroad to grant transit privileges at Cadosia, New York, on shipments with certain origins and destinations. The Railroad had granted such rights at Cadosia on shipments having certain other points of origin and destination. Since one part of each of the transportation movements in controversy was wholly within the State of New York, the Railroad challenged the Commission's order on the ground that the Commission had no jurisdiction over an intrastate shipment, and it became necessary for the three-judge court to determine whether the two legs of the journey, one intrastate and the other interstate, formed a continuous movement so as to subject the entire movement to the jurisdiction of the Interstate Commerce Commission. The Railroad asserted that since it did not intend the two legs of the journey to be joined, the element of continuity necessary for transit shipments was lacking. It also asserted that the nature of the operation performed at Cadosia was such as to break the continuity. The Court answered this latter objection by pointing out that the Railroad itself had granted transit rights for this particular operation at Cadosia between different points of origin and ultimate destination, and that the Railroad could not therefore rely on that kind of an interruption. The Court said that intent, while not alone conclusive because no one element is that, is probably the

most important single determinative of continuous carriage, and in determining the question of continuity, said: "Here it is not material to learn where the methanol is going, but only that it is upon some through route which crosses a boundary of New York".

Applying the principles of these decisions to the case at bar, we find the following undisputed facts in this case. Petitioner certainly intended that the material would not be disposed of locally at Mansfield but would go to the destinations to which it ultimately moved. The transit arrangement at Mansfield was set up as a result of negotiations commencing with three letters plaintiff wrote to the Railroads (I. C. C. Exs. 1, 11 and 24, pp. 294b, 307b and 321b). In Exhibit 1, addressed to the Pennsylvania, plaintiff pointed out that the material would be used "for the construction of Army and Navy huts" and would move to Mansfield and "thence either East, West or South on your line". In Exhibit 11, addressed to the Baltimore & Ohio Railroad, plaintiff stated that the business was moving or would move to Army and Navy stations and that some of it would move "to New Orleans for export and possibly to other Texas and West Coast ports". In Exhibit 24, addressed to the Erie Railroad, plaintiff stated that the material would be fabricated for Army or Navy purposes and would move "to New Orleans for export or perhaps to the other Gulf or West Coast ports".

The Railroads certainly understood that the material would move beyond Mansfield because they amended their transit tariffs to permit that very thing. In their application to the Interstate Commerce Commission to put the amendment into effect on one day's notice, they stated that "The outbound traffic, after fabrication at Mansfield, would move approximately 50% to the Pacific Coast, 25% to New Orleans and 25% to New England territory" (I. C. C. Ex. 28, p. 326b).

That the government intended these shipments to move to the seaboard and thence overseas is likewise conclusively demonstrated. Lieutenant Dippold testified that the government bills of lading were issued to Great Lakes Steel Corporation "more or less in blank" (p. 288a) and that the government did not know what shipments were going to be covered by the bills of lading until the cars were loaded (p. 289a). Defendant's Witness Brenner called attention to the fact that each government bill of lading bore a reference to "ODT Block Permit OMR-NM-6600-00-N". He testified that this Block Permit was issued "to permit the movement of Navy export freight into a port area for unloading at facilities operated by the U. S. Navy" and that unless this were Navy export freight it would not have been permissible to move it into Davisville for export (p. 169a). If it had not at all times been the intention of the Navy to ship these articles overseas, or if there had been the slightest intention of taking possession of them at Mansfield or of making any other disposition at Mansfield, the Navy would not have indiscriminately issued to Great Lakes Steel Corporation bills of lading for the shipment of these articles bearing a certificate that the articles would be exported. The articles were part of Quonset huts used in great quantities by the Navy for housing personnel for overseas bases. The war was not being fought at Mansfield; the war was being fought in Europe and in the Pacific, and the controlling "aim and desire" of the government was to get the Quonset huts, of which these articles were parts, to the overseas bases as fast as possible, and for that purpose to get them to the various embarkation points for shipment overseas. There cannot be the slightest doubt that the Navy intended at all times that these articles move out of Mansfield to the various coastal ports for shipment overseas. There is absolutely no basis in the record for any holding that any of the par-

ties, Petitioner, the Railroads or the Navy, did not intend that the final destination of the shipments would be one or the other of the points to which they were ultimately shipped.

There is no other evidence in the record which will support any claimed break in continuity.

The Railroads' principal witness was Charles E. Brenner, of the Traffic Department of the Baltimore & Ohio Railroad Company. He had been so employed for twenty-five years doing "rate construction and commerce work generally" and was familiar with the issues in this proceeding (pp. 165a and 166a). He testified that if these shipments had been commercial export shipments and the technical requirements of the commercial export tariffs had been complied with by Petitioner, Petitioner would have been entitled to the same export rate paid by the government on shipments to the West Coast, and in such case the transit tariffs would have been applicable (p. 214a). The correctness of this testimony was admitted by Mr. Cole, attorney for the Railroads (pp. 693c-698c).

Respondents have pointed out a number of facts which they assert, taken together, show a break in the continuity of these shipments. Most of these were discussed and authorities for our position cited in our petition for writ of certiorari. These points and the pages of our petition where they are discussed, are as follows:

Transfer of Title (pp. 14-15)
Control Over The Shipments (p. 16)
Payment of Freight Charges by the Government (p. 16)

and the assertion that plaintiff was not the shipper of the goods from Mansfield (pp. 16-17). On this latter point, Respondents have cited certain cases in which the term

"shipper" has been held to include some one other than the person who signs the bill of lading as consignor. There is no doubt that the word "shipper" can be an elastic term and that at times its meaning must be determined from the context in which it is used. Where, however, the transit tariffs granted the transit right to "operators of fabricating plants who keep records, file reports and handle shipments in the manner prescribed herein" (I. C. C. Ex. 63, Rule 2, p. 405b) or to "shippers, transit house owners or operators who comply with these rules, keep records in the manner prescribed in Rules 15 and 25, and make statements, when requested" (I. C. C. Ex. 65, Rule 10, p. 413b; I. C. C. Ex. 68, Rule 10, p. 437b), it is obvious that the person who is entitled to the rights granted by these tariffs is the transit house operator and not the person who, under certain definitions, might be included in the term "shipper". This is demonstrated additionally by the following provision which appears identically in each of the tariffs:

"SHIPPER'S CERTIFICATE

"In instance where the transit operator at the transit point, for commercial reasons, forwards shipments from the transit point in the name of another party, firm or corporation, the actual transit operator must add to the shipping certificate the following:

"For commercial reason the shipment from..... .....(Station) in car (Car initial and Numbers) shows consignor as (Name of Firm).

.....
Signature of Transit Operator

"This form must be properly filled out with shipping directions for each outbound car."

(I. C. C. Ex. 64, Rule 15, p. 411b; I. C. C. Ex. 65, Rule 65b, p. 414b; I. C. C. Ex. 68, Rule 65b, p. 439b). This rule was not applicable to any of the shipments involved in this case because in every instance Petitioner was designated on the bill of lading as the "shipper" or "consignee". (I. C. C. Exs. 77-79, pp. 467b-479b.) But it indicates plainly that the person who was in control of the shipment so far as determining the use of the transit tariffs is the transit house operator.

The control which the Navy could exercise over these shipments after they left Mansfield was precisely the same as the control any commercial consignee could have exercised over a commercial consignment. The only thing that either of them could do after the cars left Mansfield, was to divert them to some point not covered by the transit tariffs. Respondents make the point that Lieutenant Dippold testified that the government was not interested in the shipments to Mansfield. The government's interest in the shipments to Mansfield was precisely the same as would be the interest of any commercial purchaser of the goods f. o. b. Mansfield. It was necessary that the material get to Mansfield in order that it might be fabricated, whether Petitioner's sale was to the government or to a commercial purchaser.

The only argument left on which to base any claim of break in continuity in these shipments, as distinguished from commercial shipments, results from the fact that the government was the purchaser and that the shipments were made on government bills of lading. In considering this, it must be borne in mind that each government bill of lading specified on the back that "unless otherwise specifically provided or otherwise stated hereon, this bill of lading, is subject to the same rules and conditions as govern commercial shipments made on the usual forms provided therefor

by the carrier". (I. C. C. Exs. 78 and 79, pp. 478b and 479b.)

Two differences are claimed to have resulted from the fact that the outbound shipments were made on government bills of lading: the first is that where shipment is made on government bill of lading the railroad agrees to look only to the government for payment of freight charges. But this Court has held plainly that so long as discrimination does not exist, a carrier may contract to look only to the consignee for payment of freight charges. *Louisville and Nashville Railroad Company v. Central Iron and Coal Company,* 265 U. S. 59. The other is the claim that the government, on the shipments from Mansfield, paid a lower rate than would have been available on commercial shipments.

The Commission's opinion and the briefs filed in this case make reference to the government taking advantage of so-called "Section 22 Quotations". This should not create the impression that the government received a special rate on these shipments and that Petitioner is attempting to take advantage of it.

Section 22 of the Interstate Commerce Act (49 U. S. C. A. 22), among other things, authorizes a carrier to transport property of the government free or at reduced rates. Railroads' Witness Brenner testified that the rates paid by the government on shipments to Davisville and Norfolk were not "Section 22 Quotation" rates but were the "Public Export Rates" (p. 242a). There cannot be any question that on those shipments the government did not receive any special rate. The effect of the rates given on shipments to Gulfport will be hereinafter discussed. Those were concededly land-grant rates. The claim is made, however, that the shipments to the West Coast were carried at a special rate to which only the government was entitled. This is not so.

Witness Brenner identified Exs. 81 and 82 (pp. 482b-486b) and testified that because of these exhibits the government paid the export rate of 63¢ on shipments to the West Coat (pp. 171a-172a). An examination of these exhibits will show that they did not offer the government any special rate. They did provide that on shipments by or for the account of the various departments of the government, the export rate could be made applicable without complying with certain technical conditions of the export tariffs designed to assure that the material shipped would be exported. These conditions are set forth in Exhibit 80 (pp. 480b and 481b). These are the identical regulations which the Commission has held "constituted unreasonable regulations" during wartime in *Peden Iron and Steel Company v. Texas and New Orleans Railroad Company.* This case is reported twice, 264 I. C. C. 769 and 268 I. C. C. 562, the first citation being an opinion of a division of the Commission and the second an opinion of the full Commission. This case is discussed on pp. 28-29 of the brief filed by Respondents Railroads. In their brief, the Railroads state that the rates provided in the export tariff were held inapplicable because of failure to comply with regulations similar to those set forth in Exhibit 80. An examination of both opinions of the Commission will show that this is not so. These special provisions of the export tariff were held clearly to be unreasonable regulation during wartime and it was held that "In any circumstances relating to control of the transportation, whether by the Navy or complainant, the latter had the right to regulations and charges that were wholly reasonable for the transportation of export traffic, considering the emergency conditions and the required handling under those conditions." (268 I. C. C. 564.) The export rates were held inapplicable in the *Peden* case only because the export tariffs contemplated shipments directly from Chicago to the West Coast and the shipments

there involved moved over a circuitous route via Houston, at which point they were stopped for fabrication in transit. There can be no question that under the *Peden* case a commercial shipper during wartime could not have been deprived of the benefit of the export tariffs merely because of his inability, due to wartime conditions, to comply with the provisions of the export tariffs set forth in Exhibit 80.

This leaves the shipments to Gulfport. The rates paid on these shipments were land-grant rates, rates to which a commercial shipper would not have been entitled. If these particular shipments did not comply with the provisions of the transit tariffs, which required that the shipments from the transit point pay the "lawful rate", perhaps the transit tariff should be held to be inapplicable to those shipments; but there is no reason why that should affect the transit right on shipments which clearly did comply with the provisions of the tariffs, and the shipments to Gulfport are not very important in this case since they constituted only a small part of all of the shipments involved.

The only effect of giving the government a lower rate on the shipments to Gulfport would be to decrease the amount of the refund to which Petitioner would be entitled under the transit tariffs. The tariffs provided that where the claim method was used, an adjustment of freight charges would be made on the basis of the lawful rate from point of origin via the transit point to final destination. (Ex. 64, Rule 12, p. 410b; I. C. C. Ex. 65, Rule J50, p. 420b; I. C. C. Ex. 68, Rule K35, p. 445b.) The purpose and the effect of these rules is to give to the Railroad, as a net transportation charge for the entire movement, the rate applicable from point of origin via the transit point to point of ultimate destination plus the transit charge. To the extent that this aggregate amount is less than the total transportation charges paid on the inbound and outbound movements,

the transit house operator is entitled to a refund, but the less the government paid on the outbound shipments the smaller would be the refund. Any advantage given to the government in the form of lower rates would come out of Petitioner and not out of the Railroads.

The authorities which we have cited in this brief and in the petition for writ of certiorari establish conclusively that had Petitioner's customer been a commercial purchaser f.o.b. transit point rather than the government, plaintiff would clearly have been entitled to the rights granted by the transit tariffs. The outbound shipments (except those to Gulfport) would have been made at the same rates as those paid by the government, and the intention of a commercial shipper that the inbound and outbound movements be considered as independent of each other would not have affected this result. In such a situation the transfer of title to the purchased property, the actions performed by Petitioner as a shipper, the control of the traffic after it left the transit point, the designation by the purchaser of the routes over which the property was to be shipped and the payment of freight charges from transit point to ultimate destination by the purchaser, would have been precisely the same as occurred in connection with the shipments here involved.

We submit therefore that the decision of the Commission is supportable only on the theory that there is such a difference between a commercial shipment and a shipment on government bill of lading as to make the "desire and aim" of the government the controlling factor as to continuity in the one case where the desire and aim of the commercial purchaser would be of no importance in the other.

There was no evidence to show any reason for the "desire and aim" of the government. No such reason is asserted in the briefs filed in this case except that by treat-

ing them as separate the government might obtain a lower rate on the outbound movement, but this basis for treating the movements as separate was expressly repudiated by the Commission in *Memphis Merchants Exchange v. I. C. R. R., supra,* and by this Court in *Baltimore & Ohio Southwestern Railroad Company v. Settle, supra,* and in *United States v. Erie Railroad Company,* 280 U. S. 98.

In the final analysis, Petitioner's rights under the transit tariffs were denied by the Commission solely because the government, rather than a private individual, was the purchaser of the goods shipped. The effect of such a decision on the government and on government contractors is obvious. The transit house operator looks to the refund available under the transit tariffs to reduce his overall cost of production. All other things being equal, the inevitable result of the decision is to increase the cost of performing government contracts over commercial contracts. This added cost must either be borne by the government contractor or passed on to the government, and this added cost, which goes into the pockets of the railroads, and which results solely from increased transportation costs, is directly contrary to the theory of Congress in enacting Section 22 of the Interstate Commerce Act which was intended to provide the government with lower rather than higher transportation costs. Whether the exclusion of traffic moving outbound from the transit point on government bills of lading results from interpreting an unambiguous tariff so as to include an exception not set forth in the tariff or from a determination that the mere fact that the traffic moves on a government bill of lading itself creates a break in the continuity, the result is to deprive a transit house operator of the rights of the transit tariffs on all sales made to the government f.o.b. transit point.

We submit that this is a question of such importance as to warrant the consideration of this Court, that the precise question thus stated has never been but should be settled by this Court and that in reaching their decisions, the lower courts have failed to follow applicable decisions of this Court.

It is respectfully submitted that the writ of certiorari should issue.

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